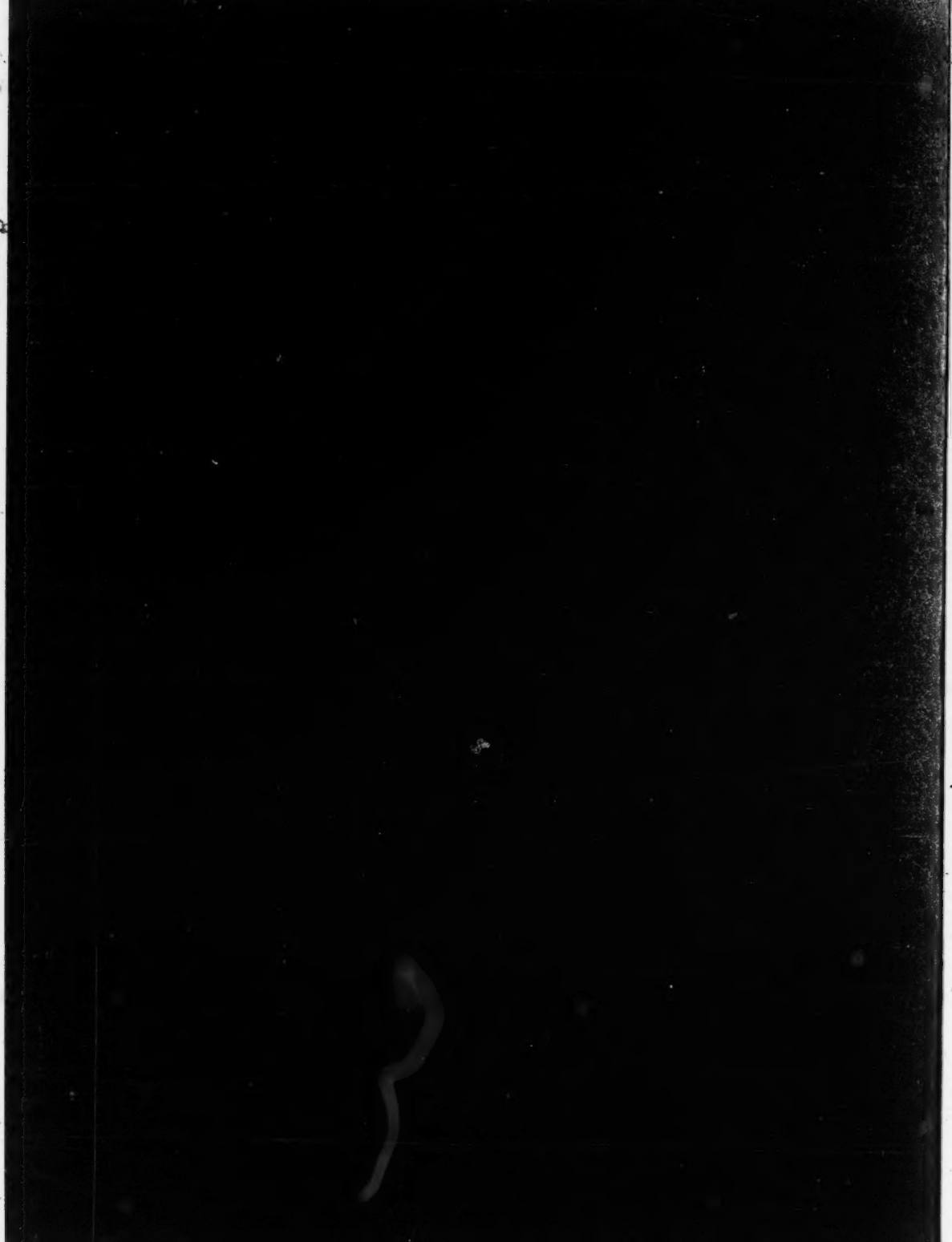

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. .....

ALTON ELVERDO HORLOCK,
Appellant,

vs.

JAMES RAYMOND OGLESBY and DORIS JEAN OGLESBY,
Appellees.

On Appeal from the Supreme Court of Indiana.

MOTION TO DISMISS OR AFFIRM.

Appellees in the above entitled cause move to dismiss and/or affirm on the grounds that:

A. That the Appeal from the state court judgment does not present a substantial federal question or questions.

B. That the state court judgment rests on adequate non-federal basis.

C. That the federal question sought to be reviewed was not expressly passed on.

D. That the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

A. The Appeal Does Not Present a Substantial Federal Question.

The Appellant's attempt to appeal this cause to this Court should not be permitted as the appeal does not present a substantial federal question. Appellant's reliance on criminal cases where this Court has faithfully protected the rights of the poor have no application to this adoption case.

This case does not involve the poor nor poverty. There is nothing in the record to show that those who are able but do not pay support are, or will be, treated any differently than those who can, but do not, pay support for their children. Rather than involving a substantial federal constitutional question, the case turns upon the proper exercise of discretion by a state trial judge who heard the evidence and had an opportunity to see the witnesses and hear the evidence.

The Appellant fails to cite to this Court evidence of, or authority to support, his allegations of discrimination. Certainly the Indiana Court had the right to place the burden upon one seeking to have an act of the Indiana General Assembly declared unconstitutional as discriminatory against a class to substantiate said claim. Likewise, the Indiana Court had the right to rely upon the presumption in favor of a statute's validity. In the absence of either, the Court obviously found it unnecessary to pass upon the validity of the statute here involved.

The Indiana Court found no constitutional question involved in reaching its decision. In the absence of a finding of a constitutionality question in the Indiana Supreme Court it is difficult to find that a substantial federal question is presented.

B. **The Judgment Rests on Adequate Non-Federal Basis.**

Appellees' amended Petition for Adoption is set forth in the opinion of the Indiana Supreme Court, Appendix pp. 16-19. Rhetorical paragraph 6 of the Petition provides as follows:

6.

> "Petitioners would further show to the Court that the consent of the natural father, Alton Elverdo Horlock, to the adoption herein should be dispensed with for the reason that said Alton Elverdo Horlock **has for more than six months immediately proceeding the date of the within petition, deserted and abandoned said minor child,** and has failed and neglected for a period of more than one year immediately prior to the filing of the within petition for adoption, to pay any support money for said minor child, or to support said child in any manner whatsoever." (our emphasis.) Appendix p. 18.

Burns Indiana Statutes, Annotated, Vol. 2, Part 2, 1946 Repl., § 3-120, pp. 777-778, the same being the Acts of the Indiana General Assembly of 1941, Chapter 146, § 5, pp. 441-443, is set forth in verbatim in Appellant's Jurisdictional Statement, pp. 3-4 and will therefore not be here reprinted in full. The statute in question authorizes a trial court to dispense with the consent of the parent or parents under either of the following conditions:

> "Such consent of parent or parents may be dispensed with if such child is adjudged to have been abandoned or deserted for six (6) months or more immediately preceding the date of the filing of the Petition."

Or as to the father:

> "In all cases where the father of any child or children has failed to pay any support money for a period of one (1) year immediately prior to the filing

> of adoption proceedings for the adoption of his child or children, the Court may in its discretion not require the filing of the consent of the father in such instances."

There is no requirement under Indiana law for a party to prove both of the above conditions in order for the Court to dispense with the consent of a parent.

Appellant filed no request for special findings of fact with the trial court. This is extremely important since the Court's judgment was a general judgment. Since on appeal Appellant specifically raised the question of insufficiency of evidence of abandonment and desertion to set aside the adoption here in question (Appellant's Brief, Indiana Supreme Court, p. 47) and the Court refused to reverse on said grounds, it must be assumed and inferred that the Court found sufficient evidence to support abandonment and desertion as well as the failure to support.

Appellant on appeal to the Indiana Supreme Court argued that it was necessary for Appellees to prove both of the above grounds for dispensing with the consent of Appellant herein because of the use of the conjunction "and" in Appellees' petition. On the other hand, Appellees contended that the adoption could be sustained on either ground as well as both. The opinion of the Indiana Supreme Court which discusses acts of abandonment and desertion upon the part of the Appellant as well as the failure to pay support concludes:

> "The evidence most favorable to Appellees is discussed hereinabove and is sufficient to sustain the decision of the trial court." Appendix p. 25.

Counsel for Appellant correctly anticipated on page 12 of the Judicial Statement that Appellees would argue that the judgment of the Indiana Court was on an adequate non-federal basis. We submit that the above quoted por-

tion, together with the opinion of the Indiana Supreme Court in its entirety, discloses that the decision is not limited solely to the failure to pay support.

Counsel for the Appellant asks this Court to review the evidence and conclude, as he has done, that there is no evidence of abandonment or desertion.

Appellant cites no authority, and we have likewise been unable to find any, which would permit this Court to review conflicting evidence and reach a different result than reached by the trial court in this case. Lastly, the Court indicated that it was not necessary to pass upon the constitutionality question.

Appellant raised no question in the Indiana Courts, or in this Court, concerning the constitutionality of the first section of Section 3-120, supra.

The decision of the trial court having been affirmed on an adequate and reasonable ground under Indiana law does not therefore present a substantial federal question for review.

Appellant argues that the statute in question discriminates against the poor. Is this Court ready to hold that those who earn six thousand dollars per year are poor? Does this act place a burden upon the poor? He attempts to champion the cause of a class which Appellant concedes:

> "He, fortunately for Appellant in all respects of his life other than this litigation is not" (Appellant's Jurisdictional Statement, p. 8).

He is not prejudiced against because some other father may be unable to pay support and thus risk the loss of his child. The statute makes no requirement as to the amount of support and thus even a nominal amount would certainly be interpreted as preventing a dispensing of consent. As to those who are more fortunate financially, such as Appellant, the law is still discretionary

and not mandatory. The law clearly bestows a broad discretion in the right of the trial judge to dispense with the father's consent. It has been said, that even if it appears that a father intentionally refused to pay support for his child, he might retain the privilege of blocking the adoption by refusing to consent. 40 Ind. L. J. 391.

Appellant's argument that the statutes "do(es) not differentiate between those who **will not** pay support and those who **cannot** pay support" is without merit. The statute creates no classifications. It leaves to the sound discretion of the trial judge to weigh all the evidence before dispensing with, or refusing to dispense with, the consent of the natural father. The Appellant is not a wounded veteran of the Southeast Asian conflict, but one who has over the years abandoned and deserted his child and even though earning $6,000 per year could not see fit to pay one cent for support in the year immediately prior to the filing of the Adoption Petition. In the entire period from the date that the adoption was filed until the trial—he paid no support. In the time from trial until this date—he has paid no support.

This Appellant has defaulted not only financially, but in all of his obligations as a natural parent. He refused to consent to the adoption. He asks this child to bear the burden of having a parent who is alive, but who has seen fit to see him only one time since 1958. He has no intention of seeing the child (R. p. 74). He would thus for all practical purposes make this child an orphan.

The evidence of failure to support was not limited solely to the question of dispensing with consent, but was additional evidence of abandonment and desertion.

Appellant not being of the class which he argues is discriminated against cannot complain.

Cronin v. Adams, 1904, 192 U. S. 108, 24 S. Ct. 219, 220, 48 L. Ed. 365.

Cook v. Davis, C. C. A. 5, 1949, 178 F. (2d) 595, 599, cert. den. 340 U. S. 811, 71 S. Ct. 38, 95 L. Ed. 596.

The theoretical assertion of unconstitutional inequalities, or the possible unequal operation of a statute, on others less favorably situated is not the basis for challenging legislation as discriminatory.

Shearer v. Burnet, 1932, 285 U. S. 288, 52 S. Ct. 332, 334, 76 L. Ed. 724.

Appellant has wholly failed to show, or even argue, that someone in a comparable situation has been, or will be, treated differently.

National Union or M. C. & S. v. Arnold, 1954, 348 U. S. 37, 75 S. Ct. 92, 94, 99 L. Ed. 46.

C. That the Federal Question Sought to Be Reviewed Was Not Expressly Passed on.

The Indiana Supreme Court in its opinion stated:

> "Appellant admitted he was unable to find a precedent to support his constitutional argument and thus it is unnecessary for us to pass on the constitutionality of the statute." Appendix p. 26.

From the face of the opinion it is self-evident that a constitutional question was not decided and is not here subject to appeal. Under section "B" above, we have sought to show to the Court that the judgment rests on an adequate non-federal basis. Apparently the Indiana Supreme Court was of the same opinion as their decision was reached without reliance upon the constitutionality or unconstitutionality of the statute.

D. The Questions on Which the Decision of the Cause Depends Are So Unsubstantial as Not to Need Further Argument.

In the alternative we submit that Appellant's questions presented are so devoid of merit and unsubstantial as to require this Court to dispose of same without further argument.

In the interest of brevity we will not repeat the reasons pointed out heretofore in the Motion to Dismiss but ask this Court to consider same in support of affirming the judgment below.

CONCLUSION.

A most compelling reason for not granting an appeal in this case, in addition to those heretofore submitted, is the utter chaos that would be created in this country in the area of adoptions and heirship. In an article in the Indiana Law Journal "Dispensing With Parental Consent in Indiana Adoption Proceedings," 40 Ind. L. J. 378, 390, Burns Indiana Statutes, § 3-120, supra, is recognized as being similar to the law of other states which for one reason or another dispense with parental consent. See: 39 U. Det. L. J. 347, 360, n. 89, where an exhaustive list of the statutes of fifty-one jurisdictions is presented.

Were this Court to hold this statute unconstitutional the impact upon those who are not parties to this litigation could be shocking. To suddenly cast aside this statute could suddenly destroy the family relationship established by adoptions of long standing in our state and country. Should such a cloud be placed upon adoptions granted under this Act? Should questions on heirship suddenly be raised? The injustices that would result are unlimited and self-evident.

It is not the statute which has deprived this natural parent Appellant of his child, but it is his own voluntary

inaction. He held the key to prevent the adoption by not abandoning and deserting his child and/or paying support. That he chose instead by inaction to lock the door to this child is his own fault and not that of the statute.

It is respectfully submitted that Appellant's appeal be dismissed and/or affirmed for the reasons above stated.

THEODORE LOCKYEAR,
702 Court Building,
Evansville, Indiana 47708,
Counsel for Appellees.

Dated at Evansville, Indiana, April 5, 1968.